No. 80-1272

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

COUNTY OF SAN MATEO, a political subdivision of the State of California, and THE RETIREMENT BOARD OF SAN MATEO COUNTY,
Petitioners,

VS.

SIDNEY H. CANTWELL, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
to
Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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REASONS WHY WRIT SHOULD BE DENIED

1. The decision of the Court of Appeal which Petitioners ask this Court to review is clearly not erroneous.

In reaching its decision the Court of Appeal adopted the reasoning of this Court in *Case v. Bowles,* 327 U.S. 92 (1946), and *Jennings v. Illinois Office of Education,* 589 F.2d 935 (7th Cir.), *cert. denied,* 441 U.S. 967 (1979). The decision of the Court of Appeals for the Fifth Circuit

in *Peel v. Florida Department of Transportation,* 600 F.2d 1070 (1979) also supports the decision of the Court of Appeal in the instant case.

Thus, the Court of Appeal in deciding here for the respondent was not charting a new course, nor was it acting in an area void of precedent. It was following established case law.

2. There is no conflict between the decision of the Court of Appeal in the instant case and any decision of this Court or of another Court of Appeal

In their petition the Petitioners cite no case decided by this Court or by any Court of Appeal which is in conflict with the decision of the Court below.

The Petitioners rely principally on *National League of Cities v. Usery,* 426 U.S. 833 (1976). Petitioners state at page 8 of their petition that the decision of the Court of Appeal "does conflict in principle with the reasoning of the *National League of Cities* decision." This is not so. The holding in the *National League of Cities* case is specifically limited to legislation enacted by Congress under powers conferred upon it by the Commerce Clause, Article I, Section 8, Clause 3. (426 U.S. at 852, fn. 17.)

The power which Congress exercised in enacting 10 U.S.C. Sec. 1336 was conferred upon Congress by Article I, Section 8, Clauses 12 and 13, which give Congress the power to raise and maintain armies and a navy. The Petitioners at page 7 of their petition concede that this Court expressly stated in the *National League of Cities* decision that nothing in that decision was intended to

address the scope of Congress' authority under its war power. (426 U.S. at 833, fn. 18.).

3. **The decision of the Court of Appeal does not frustrate the legitimate State purposes of prohibiting public employees from receiving credit in two public retirement systems for the same period of service rendered to only one public agency, as Petitioners assert in their petition**

The Court of Appeal states in its opinion:

> "We note parenthetically that California could have chosen not to afford credit for any prior public service. Having chosen to do so, however, it can not do so in a manner which conflicts with Sec. 1336." (petition-appendix APP 10 and 11)

Thus the decision of the Court below does not deprive the State of prohibiting employees from receiving credit in two public retirement systems for the same period of public service.

4. **The decision of the Court of Appeal is of doubtful importance.**

The Petitioners have not indicated in their petition what number of County employees will qualify for additional pension credit of the type Respondent will be entitled to receive under the Court of Appeal decision. Respondent in a declaration filed in the District Court estimated that the number would not exceed twenty. The County did not attempt to refute the correctness of this number. The information available to the Respondent is that since the entry of the judgment by the District Court less than six

County employees have sought to obtain credit for active military service toward their County pensions based upon the District Court's judgment.

Thus the financial burden which decision of the Court of Appeal will place on the County will certainly not be enormous.

Employees of the State of California, of many other counties, of numerous cities, districts, public agencies and authorities within the State, are members of the Public Employees Retirement System. That system is governed by rules different from the retirement system of which the Respondent is a member. The rules of that system specifically allow credit to its members for active military service of the type for which the Respondent has been allowed credit by the decision of the Court of Appeal.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Dated: February 12, 1981

Respectfully submitted,

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